United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

77-7216

B
P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ASSOCIATED METALS & MINERALS CORPORATION,

Plaintiff-Appellee-Cross-Appellant,

—against—

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Defendant-Appellee.

—and—

APPALACHIAN INSURANCE COMPANY OF PROVIDENCE,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
AUG 9 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF OF ASSOCIATED METALS & MINERALS CORPORATION, APPELLEE-CROSS-APPELLANT

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In the

United States Court of Appeals

For the Second Circuit

No. 77-7216

Associated Metals & Minerals Corporation,

Plaintiff-Appellee-Cross-Appellant,

—against—

Hartford Accident & Indemnity Company,

Defendant-Appellee,

—and—

Appalachian Insurance Company of Providence,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ASSOCIATED METALS & MINERALS CORPORATION, APPELLEE-CROSS-APPELLANT

Issue Presented

Does the exclusion in a comprehensive policy of insurance for damage arising out of the conduct of a joint venture apply not only to damage for which the insured is vicariously liable by reason of acts of its joint venturer, but extend to damage resulting from acts of the insured itself, albeit in acting for the joint venture?

Statement of the Case

A. Nature of the Case

ASSOCIATED METALS & MINERALS CORPORATION ("Associated") commenced this action pursuant to 28 U.S.C. §2201 for a judgment declaring, among other things, that the disclaimer by HARTFORD ACCIDENT AND INDEMNITY COMPANY ("Hartford") of coverage under a comprehensive policy issued by it to Associated was improper, that Hartford is required to defend and indemnify Associated against the claims asserted against it in an action pending in South Dakota, and to the extent that the claims asserted against it in such action exceed the amount of the Hartford policy that APPALACHIAN INSURANCE COMPANY OF PROVIDENCE ("Appalachian") is required to indemnify Associated (A-26a-32a).*

B. Disposition Below

The District Judge held that Appalachian is required, subject to the limitations in its policy, to defend Associated in the South Dakota action, to reimburse it for its expenses incurred to date and to hold Associated harmless for any liability arising out of such action. The District Judge held, however, that Hartford is not liable under its policy, thereby exposing Associated to liability in the South Dakota action to the extent of $25,000 not covered by the Appalachian policy (A-20a-21a).

The parties have agreed that Appalachian shall be deemed the appellant and Associated shall be deemed the appellee-cross-appellant on this appeal.

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* Unless otherwise indicated references are to pages in Appendix.

C. Statement of Facts

The facts are not in dispute.

1. *The Parties*

Associated is a corporation incorporated under the laws of the State of New York with its principal office at 733 Third Avenue, County, City and State of New York (A-10a). Gulf Chemical & Metallurgical Company ("Gulf") is a division of Associated (A-10a).

Hartford is a Connecticut insurer licensed to do insurance business in New York (A-10a).

Appalachian is a Rhode Island insurance corporation wholly owned by Allendale Insurance Company, also a New York licensed insurer (A-10a).

2. *The Insurance Policies Issued to Associated by Hartford and Appalachian*

Hartford, upon payment to it by Associated in 1974 and 1975 of aggregate premiums in excess of $250,000, issued each year to Associated a comprehensive general liability policy indemnifying Associated for property damage liabilities incurred by it, its subsidiaries and divisions (including Gulf), and requiring Hartford to defend Associated in any action commenced against Associated to recover any such loss (A-10a; E-1-169).*

The Hartford policy contains the following provision:

> "This insurance does not apply to bodily injury or property damage arising out of the conduct of any . . . joint venture of which the insured is a . . . member and which is not designated in this policy as a named insured." (A-11a; E-9).

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* References preceded by "E" are to Exhibit volume.

Appalachian, upon payment to it by Associated of aggregate premiums in excess of $50,000, issued for the period March 1, 1972 through May 1, 1975 to Associated a "Special Risk Policy" and "Umbrella (Excess) Liability on All Operations of the Insured." Under this policy Appalachian was required, within the stated limits thereof (i.e., loss not otherwise covered in excess of $25,000 and not exceeding $10,000,000), to indemnify Associated for all liabilities incurred by it, its subsidiaries and divisions (including Gulf), and to defend Associated in any action commenced against Associated to recover any such loss (A-10a; E-169 *et seq.*).

3. *The South Dakota Action*

In March 1976, Grismer Farms, Inc. ("Grismer") brought an action in South Dakota against Associated and eleven others ("South Dakota") alleging, in substance, that the defendants were responsible for the manufacture and sale to it of deleterious feed ingested by Grismer's cattle. Grismer sought damages in the sum of $3,500,000 plus interest in that action. Each of the other defendants in the South Dakota action cross-claimed against Associated (A-27a-28a).

Although Grismer's complaint in the South Dakota action alleges that Associated was engaged in a business venture, it does not allege that this business venture was responsible for the loss said to have been sustained by Grismer. Rather, with respect to Associated, the complaint contains only allegations of individual acts of wrong doing (A-35a-46a).

ARGUMENT

The Court Below Erred In Holding That the Hartford Policy Does Not Cover the Claims Asserted Against Associated In the South Dakota Action.

The District Court summarized the respective positions of the parties accurately.

On the one hand, Hartford contends that "Under its policy, the insurance does not apply to property damage: 'arising out of the conduct of any . . . joint venture of which the insured is a . . . member and which is not designated in this policy as a named insured'" and, therefore, since "Grismer's theory is that the contaminating agent was contained in the magnesium oxide processed and sold by the Gulf/MRDC joint venture; accordingly, the alleged property damage must be viewed as 'arising out of the conduct' of that joint venture; and, since the joint venture was not designated in the policy as a named insured, there is no coverage." (A-13a-14a).

On the other hand, Associated, relying upon *Shehee* v. *Aetna Casualty Insurance Co.*, 122 F. Supp. 1 (W.D.La. 1954), maintains that "the effect of the exclusion is limited to vicarious liability which might be visited upon Associated solely as the result of the negligence of a joint venturer, wholly uncomplicated by any negligence on the part of Associated itself." (A-14a).

The District Court, however, erred in concluding that the *Shehee* exclusionary clause relating to "the *liability* of the assured as a member of the partnership" was narrower than the Hartford exclusion limited to "the *conduct* of any joint venture of which the insured is a member," A-16a, since liability of a member of a partnership or joint ven-

ture necessarily includes the liability of any member thereof for damages arising out of the *conduct* of the partnership or joint venture. *Caplan* v. *Caplan,* 268 N.Y. 445, 447, 198 N.E. 23 (1935); *Hardin* v. *Robinson,* 178 App. Div. 724, 729, 162 N.Y.S. 531, 535 (1916). Since the *Shehee* exclusion is broader than the Hartford exclusion, coverage of the Shehee policy is less comprehensive than that provided by Hartford. Consequently as in *Shehee* the exclusionary clause in the Hartford policy is limited to "vicarious liability which might be visited upon Associated solely as a result of the negligence of a joint venturer * * *."

CONCLUSION

For the reasons set forth above, the judgment entered below should be modified to provide that Hartford is and was at all times relevant liable to defend Associated in the South Dakota action, that Hartford is liable to indemnify Associated from all claims up to $100,000 in the South Dakota action, that Appalachian is required to indemnify Associated from all claims in excess of $100,000 and up to $10,000,000 in the South Dakota action, and that Associated recover from Hartford the sum of $40,612.64, the legal expenses incurred by Associated.

Respectfully submitted,

PASKUS, GORDON & HYMAN
Attorneys for Associated Metals & Minerals Corporation, Appellee and Cross-Appellant

ROBERT R. SLAUGHTER
Of Counsel

August 8, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W 97th St NYC 10025.

That on the 9th day of AUGUST, 1977, deponent personally served the within BRIEF OF ASSOCIATED METALS & MINERALS CORPORATION, APPELLEE-CROSS-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

BEREL, NAVARRA & MULLEN
Attorneys for Defendant-Appellee
19 E. 9th St.
New York, N. Y.

ABRAMS & MARTIN
Attorneys for Defendant-Appellant
92 Fulton St.
New York, N. Y.

Murray H Berman

Sworn to before me this

9th day of AUGUST, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979